

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1123

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. RAYMOND FERGUSON,

PETITIONER-APPELLANT,

V.

**DAVID H. SCHWARZ, DIVISION OF HEARINGS AND
APPEALS,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID HANSHER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Raymond Ferguson, pro se, appeals from the trial court's order affirming a decision revoking his parole. The issues are: (1) whether the decision to revoke Ferguson's parole was supported by substantial

evidence; (2) whether the decision was arbitrary, capricious, or contrary to law; and (3) whether the hearing examiner failed to follow the Department of Corrections (DOC) penalty schedule. We resolve these issues against Ferguson and affirm.

¶2 Ferguson was convicted of second-degree murder and sentenced to twenty years in prison. He was placed on parole after serving eight years of his sentence. Three years after he was paroled, a gun accidentally discharged in his bedroom, shooting Ferguson and his girlfriend's three-year-old son both in the foot. A hearing examiner revoked Ferguson's parole for possessing a firearm and ordered him to serve the additional nine years of his sentence.

¶3 Our review of a revocation decision is very limited. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). We will consider only: (1) whether the agency kept within its jurisdiction; (2) whether the agency acted according to law; (3) whether the agency's actions were arbitrary, capricious, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the agency might reasonably make the determination in question. *Id.* "An agency's decision is not arbitrary and capricious ... if it represents a proper exercise of discretion." *Id.* at 656. "We may not substitute our judgment for that of the [agency]; we inquire only whether substantial evidence supports the ... decision." *Id.* "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Id.* (citations omitted).

¶4 Ferguson first argues that the evidence adduced at the revocation hearing was insufficient to support the hearing examiner's decision. We disagree.

¶5 Ferguson was alone with the child when a bullet passed through the child's foot and lodged in Ferguson's foot. Ferguson did not immediately seek medical attention for the child, instead phoning the child's mother at work and waiting until she returned home to seek medical care. The gun disappeared, even though it was in a private residence. Ferguson and the child were the only persons at home when the accident happened, and Ferguson claims not to have touched the gun. Because this evidence is sufficient to support the conclusion that Ferguson had possession of the gun, we will uphold that determination. *See Von Arx*, 185 Wis. 2d at 661.

¶6 Ferguson next contends that the decision was arbitrary because his agent did not consider alternatives to revocation. The record belies this claim. Ferguson's parole agent testified that she and her supervisor considered alternatives, such as giving Ferguson a warning or placing him in a halfway house, but concluded that anything less than revocation would unduly depreciate the seriousness of the violation. By weighing the options available and making a reasoned and reasonable decision, the agent did all that she was required to do. *See id.* at 656 (an agency's decision is not arbitrary if the agency properly exercises its discretion).

¶7 Ferguson also argues that the hearing examiner failed to follow the DOC's penalty schedule when she ordered Ferguson to serve nine years on revocation. Ferguson did not raise this issue before the hearing examiner.

Therefore, we need not address it on appeal. *See Santiago v. Ware*, 205 Wis. 2d 295, 324-25, 556 N.W.2d 356 (Ct. App. 1996).¹

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

¹ The State contends that Ferguson's petition for certiorari review should have been dismissed because he did not exhaust his administrative remedies as required by WIS. STAT. § 801.02(7)(b) (1999-2000). The supreme court recently held that § 801.02(7) does not apply to judicial review of an administrative revocation of probation by writ of certiorari. *See State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶6, 242 Wis. 2d 94, 624 N.W.2d 150. In light of our rejection of Ferguson's claims on the merits, we need not otherwise address Ferguson's apparent failure to exhaust his administrative remedies. *See id.* at ¶9.

